MALAYAN BANKING BHD.

v.

P.K. RAJAMANI

SUPREME COURT, KUALA LUMPUR
TUN DATO' SERI HAJI ABDUL HAMID BIN HAJI OMAR LP,
TAN SRI DATUK EDGAR JOSEPH JR. SCJ,
DATO' MOHAMED DZAIDDIN BIN HJ. ABDULLAH SCJ
[CIVIL APPEAL NO. 02-181-1992]
2 DECEMBER 1993

LAND LAW: Overdraft facilities - Renewed by letter on new terms, interest rate and security - Whether new facility or continuing security.

On 4 April 1984, the appellant granted an overdraft facility of RM50,000 (the 1st facility) with interest at 9% p.a. to Sira Communications & General Contractor (the borrower) secured by a first legal charge. Sometime in October 1984 the borrower was granted by the appellant an additional facility of RM10,000 (the second facility) making a total loan of RM60,000 secured by a second legal charge. By a letter, dated 7 March 1986, the appellant informed the borrower that it has renewed its overdraft facility for RM60,000 carrying an interest rate of 10% p.a. The said facility was secured by first legal charge and was subject to yearly review and yearly reduction of RM10,000 from 1 March 1987.

The borrower had overdrawn its account. The appellant initiated foreclosure proceedings. Order for sale was granted and auction date was fixed. The borrower applied to set aside the said order. The trial Judge set aside the said order on the grounds that the letter of 7 March 1986, had created a new facility as it contained new terms on the rate of interest and the security. The appellant appealed.

Held:

[1] The two charges, being security for the earlier facilities, are still valid because of what is stipulated in clause 6 of the annexure to the charges. It states that the security created by the charge is expressly intended to be and shall be a continuing security for all moneys whatsoever now or hereafter from time to time owing to the Bank by the customer.

[2] As the sum of RM43,604.52 was still due and owing by the borrower to the appellant on the date of the granting of the renewal of facility of RM60,000, the earlier facilities have not expired, but which the appellant had intended by the letter of facility of 7 March 1986, to be a continuing facility.

[Appeal allowed].

[Bahasa Malaysia Translation of Headnote]

UNDANG-UNDANG TANAH: Kemudahan overdraf - Diperbaharui melalui surat atas terma-terma baru, kadar faedah dan jaminan - Sama ada kemudahan baru atau jaminan berterusan.

Pada 4 April 1984, perayu telah memberikan suatu kemudahan overdraf sebanyak RM50,000 (kemudahan pertama) dengan faedah pada kadar 9% setahun kepada Sira Communications & General Contractor (peminjam) yang dijamin oleh suatu gadaian pertama di sisi undang-undang. Lebih kurang dalam bulan Oktober 1984 perayu telah memberikan kepada peminjam suatu kemudahan tambahan sebanyak RM10,000 (kemudahan kedua) dan ini menjadikan jumlah pinjaman kepada RM60,000 yang dijamin oleh gadaian kedua di sisi undang-undang. Melalui sepucuk surat bertarikh 7 Mac 1986, perayu telah memberitahu peminjam bahawa ia telah memperbaharui kemudahan overdrafnya bagi RM60,000 dengan faedah pada kadar 10% setahun. Kemudahan tersebut adalah dijamin oleh gadaian pertama di sisi undang-undang dan tertakluk kepada semakan tahunan dan pengurangan tahunan sebanyak RM10,000 dari 1 Mac 1987.

Peminjam telah mengeluarkan lebih daripada akaunnya. Perayu telah memulakan prosiding halang tebus. Perintah jualan telah diberikan dan tarikh lelongan ditetapkan. Peminjam memohon untuk mengenepikan perintah tersebut. Hakim perbicaraan telah mengenepikan perintah tersebut atas alasan bahawa surat bertarikh 7 Mac 1986, telah mewujudkan suatu kemudahan yang baru memandangkan ia mengandungi terma-terma baru mengenai kadar faedah dan jaminan. Perayu telah membuat rayuan.

Diputuskan:

[1] Kedua-dua gadaian tersebut yang merupakan jaminan bagi kemudahan-kemudahan awal, adalah masih lagi sah berdasarkan kepada apa yang ditetapkan dalam klausa 6 lampiran kepada gadaian-gadaian

berkenaan. Ia menyebutkan bahawa jaminan yang diwujudkan oleh gadaian adalah dengan jelas dimaksudkan dan hendaklah menjadi jaminan yang berterusan bagi segala wang apa jua sekarang atau kemudian dari ini dari masa ke semasa terhutang oleh pelanggan kepada Bank.

[2] Memandangkan wang berjumlah RM43,604.52 adalah masih lagi terhutang dan patut dijelaskan oleh peminjam kepada perayu pada tarikh pemberian akan pembaharuan kemudahan berjumlah RM60,000, kemudahan-kemudahan awal tidak tamat, tetapi yang mana perayu telah bermaksud melalui surat kemudahan bertarikh 7 Mac 1986, sebagai kemudahan berterusan.

[Rayuan dibenarkan].

Cases referred to:
Woo Yew Chee v. Yong Yong Hoo [1979] 1 MLJ 131 ***(cit)***
Addiscombe Garden Estates Ltd. v. Crabble [1958] 1 QB 513 ***(cit)***

Legislation referred to:
National Land Code 1965, ss. 256, 257

For the appellant - Oon Lay Yean; M/s. Suhaimi Khor Zulkifli & Chang
For the respondent - James Selva; M/s. James Selva & Co.

JUDGMENT

Mohamed Dzaiddin bin Hj. Abdullah SCJ: This was as appeal from the decision of Anuar J. given on 26 March 1992 setting aside the order for sale dated 15 February 1988 made under s. 257 National Land Code 1965 and the subsequent public auction fixed on 12 September 1990 in respect of the respondent's property, on which is situated a single storey terrace house, held under H.S.(D) 22274, P.T. 615, Mukim Kuala Lumpur, Daerah Kuala Lumpur (the said property).

Background

On 4 April 1984, the appellant granted an overdraft facility of RM50,000 (the first facility) with interest at 9% per annum to Sira Communications & General Contractor (the borrower), a sole proprietorship firm carrying on business at No. 272-1, Jalan Brickfields, Brickfields, Kuala Lumpur, to be secured by a first legal charge on the said property. In its letter of offer to the borrower, it was made known that the purpose of the loan was for use as a working capital and the loan was subject to a yearly review. On 10 April 1984, the respondent executed a first legal charge in Form 16A NLC together with an annexure containing the terms and conditions of the charge which was presented and registered at the Land Registry, Wilayah Persekutuan, on 17 May 1984.

It seemed that sometime in October 1984, the borrower applied for and was granted by the appellant an additional facility of RM10,000 (the second facility), making a total loan of RM60,000 to be secured by a second legal charge on the said property. Except for the amount of the additional loan, a similar letter of offer containing similar terms and conditions as the first facility was sent to the borrower on 16 October 1984. On 13 November 1984, the respondent executed another Form 16A and an annexture which was duly presented and registered at the Wilayah Land Registry on the following day.

Next, by a letter dated 7 March 1986, the appellant informed the borrower that the Management had approved the renewal of its overdraft facility for RM60,000, which would carry an interest rate of 10% per annum. The said facility was to be secured by first legal charge on the said property and also subjected to yearly review and yearly reduction of RM10,000 from 1 March 1987.

From the record, it would appear to us that by October 1986, the borrower had not been operating its account with the appellant satisfactorily. As the account remained overdrawn, the appellant must have decided to recall the facility and to foreclose the said property. Hence, on 18 February 1987, the appellant's solicitors sent to the respondent a letter under AR registered cover, enclosing a Notice of Default in Form 16D informing him that he had committed a breach of the provision of the charge by not paying on demand the sum of RM61,565.75 being the outstanding overdraft as at 20 October 1986 together with interest at 10% per annum on monthly rest. The respondent was then required to remedy the breach within 14 days from the date of the service of the aforesaid notice.

On 24 March 1987, the appellant's solicitors proceeded to file an originating summons under s. 256 NLC applying for an Order for Sale of the said property. Consequently, on 15 February 1988, the High Court heard the originating

summons and made orders in terms of the originating summons. This was followed by summons for direction and the fixing of an auction sale on 12 September 1990.

Respondent's summons in chambers

On 11 December 1990, the respondent filed an application by summons in chambers, which was later amended, seeking for an order that the order for sale dated 15 February 1988, the directions dated 12 August 1988 and the sale by public auction fixed on 12 September 1990 be set aside. The hearing of the application commenced on 2 October 1991. However, at the continued hearing on 26 March 1992, Counsel for the respondent raised a preliminary issue on the letter dated 7 March 1986 granting the **renewal of facility** of RM60,000 to the customer. The relevant text of the letter states as follows:

> M/s. Sira Communications
> and General Contractors
> 272-1, Jalan Brickfields
> Brickfields, Kuala Lumpur
>
> Dear Sir,
>
> Re: Our AA 86/45
> OD RM60,000
> Renewal of facility
>
> We refer to the above and are pleased to advise that our Management have approved the renewal of your OD facility subject to our terms and conditions as follows:
>
> | | | |
> |---|---|---|
> | Facility & Limit | : | OD RM60,000.00 |
> | Interest rate | : | 10% per annum
Interest rate variable at the Bank's sole discretion. |
> | Purpose | : | As Working Capital |
> | Security | : | By 1st legal charge for RM60,000 on property held under freehold HS (D) 22274 PT 615 Mukim/ Dist. of KL. |
> | Repayment | : | Yearly review and yearly reduction of RM10,000 with effect from 1 March 1987.

(All banking facilities are subjected to be recalled by the bank at any time as it deems fit). |

Based on the above letter, it was Counsel's submission that it created a new facility because it contained new terms on the rate of interest and the security. Counsel contended that the earlier facilities granted on 4 April and 16 October 1984 for a total sum of RM60,000 had expired and replaced by this new facility. The appellant had also admitted in its affidavit that this was a new facility. So, the upshot of Counsel's argument was that as this was a new facility without any security, the appellant could not enforce it against the said property, being the security for the expired facilities.

Counsel for the appellant, in her reply, relied on clauses 6 and 28 of the annexure of the charge, which stipulated that the security under the charge was a continuing security and that the Bank could vary or increase the facility at any time without affecting the security thereby created. In short, the aforesaid letter created a continuing overdraft facility granted to the borrower.

Decision

The learned Judge agreed with Counsel's submission and on that score he allowed the application and set aside the order for sale, the directions and the sale by public auction of the said property. In his brief grounds of decision in Bahasa Melayu, the learned Judge stated, *inter alia*, as follows:

> It is clear from the plaintiff's affidavits (enclosures 42 and 46) that the facilities given by the letters of offer dated 4 April 1984 and 16 October 1984 were accepted as the "old facilities". The plaintiff then admitted that it gave a "new" facility by its letter dated 7 March 1986, whereby it agreed to grant to the borrower an overdraft facility for RM60,000. This letter also contained a different rate of interest.
>
> Therefore, what is clear to me is the fact that the plaintiff based its claim on an overdraft facility which it agreed in the letter of 7 March 1986 and not based on the two 1984 letters of offer. However, the plaintiff's application in enclosure (1) shows that it is suing on the securities executed in 1984. In my opinion, the plaintiff's claim is not valid because the securities executed in 1984 have expired.
>
> I agree with the submissions of Counsel for the defendant that the plaintiff has no right to make its claim based on the old securities which have expired. Such securities cannot found a claim for the new facility.

Issue before the Court

On 15 November 1993, we heard this appeal. The issue before us was simply this: Was the

facility given in the letter of 7 March 1986 a "new" facility or a continuing facility secured by the existing charges? After hearing Counsel, we decided to disagree with the learned Judge that the facility given in the letter of 7 March 1986 was a "new" facility. We said that it was a continuing facility. So, we allowed the appeal with costs and indicated that we would give our reasons, which we do so now.

In our view, the learned Judge had taken a wrong approach in arriving at his conclusion that the facility given in the letter of 7 March 1986 was a new facility. We think he had been influenced by the contents of the letter and the admission by the appellant that it was a new facility. It is true the said letter described the facility as a "Renewal of facility". It may also be true that the appellant had admitted that it had granted to the borrower a new facility of RM60,000 subject to its terms and conditions mentioned therein. We also do not dispute that the prescribed rate of interest is 10% per annum, and therefore different from the first and second facilities of 9% per annum. However, it does not necessarily follow from these facts that the said letter creates a new facility. In our view, the correct approach would be to look at the substance, not just the label which had been attached to the letter. The law will always look beyond the terminology of the document to the actual facts of the situation and it is no longer a question of words but substance [*Woo Yew Chee v. Yong Yong Hoo* [1979] 1 MLJ 131, 133 FC; *Addiscombe Garden Estates, Ltd. v. Crabbe* [1958] 1 QB 513 CA].

Looking at the substance of the matter, by which we mean the whole loan transaction, the first thing which strikes us is that the said property is still encumbered with the first and second legal charge and has remained so until today. The first and second facility were granted on 4 April and 16 October 1984 respectively, which were secured by the aforesaid charges. Bearing in mind that the security for the new facility would be the first legal charge on the same property, it is imperative for the existing legal charges to be discharged before a fresh first legal charge is created. It is trite law that there cannot be a first legal charge on a property unless the title is free from all earlier charges. In the instant case, there has to be a discharge of charge of the said property. Alternatively, the said letter should stipulate under "security" a condition that there should be a discharge of charge of the said property before a fresh first legal charge is created. Yet, we find nothing was mentioned in the said letter. In practice, it is not uncommon for financial institutions to specify such condition in the letter of offer granting loans to their customers. Therefore, in view of the existing first and second legal charges registered on the said property, it was wrong for the learned Judge to have held that the earlier securities have expired. In our view, the two charges, being security for the earlier facilities, are still valid because of what is stipulated in cl. 6 of the annexure to the charges. It states that the security created by the charge is expressly intended to be and shall be a continuing security for all moneys whatsoever now or hereafter from time to time owing to the Bank by the customer.

Secondly, looking at the bank account of the borrower, it is perhaps pertinent to ask: What happened to the outstanding debt under the first and second facility and why was the appellant enforcing the debt under, what the learned Judge has held to be, the "new" facility without the borrower making full payment of the outstanding loan? Looking at the statement of account of the borrower (p. 243 of Appeal Record), it would appear to us that the outstanding loan as at the date of the "new" facility was RM43,604.52. There was no evidence to show that this amount has been paid or written off by the appellant and replaced by a fresh facility of RM60,000. It should also be remembered that the borrower had been at some stage or another a "bad" customer of the appellant, in the sense that its cheques were dishonoured and its account was not properly maintained. However, to say the least, it would be commercially imprudent, aside from incurring the wrath of Bank Negara, for the appellant, for no apparent or valid reason, to write off such a substantial debt of RM43,604.52. Therefore, as the sum of RM43,604.52 was still due and owing by the borrower to the appellant on the date of the granting of the renewal of facility of RM60,000, coupled with our observations stated above, we are of the view that the earlier facilities have not expired, but which the appellant had intended by the later facility of 7 March 1986 to be a continuing facility. This conclusion is supported by cl. 28 of the annexure which states that the Bank may at any time and without in any way affecting the security created, *inter alia*, determine, vary or increase any credit or other

facility granted to the Customer without affecting the existing security which is intended to be and shall be a continuing security for all monies owing to the Bank. It can, therefore, be reasonably concluded that the appellant must have this provision in mind when its Management agreed to grant to the borrower a "renewal of facility" for RM60,000 on 7 March 1986.

Conclusion

In the circumstances of the whole case and for the above reasons, we came to the conclusion that the facility of 7 March 1986 was a continuing facility and the security created by the first and second charge was a continuing security for which the appellant had rightly based its application for an order for sale under s. 256 NLC.

As we allowed this appeal with costs, we remitted the case to the Court below for an early trial before another judge to hear full arguments on the remaining issues of the respondent's application. We also ordered that the deposit be refunded to the appellant.